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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 591

A. M. WHITNEY, DOING BUSINESS AS WHITNEY TRANSFER COMPANY, INCORPORATED, HUBER & HUBER MOTOR EXPRESS, INCORPORATED, AND SILVER FLEET MOTOR EXPRESS, INCORPORATED,

Appellants,

vs.

KEEN JOHNSON, CHIEF EXECUTIVE, COMMONWEALTH OF KENTUCKY, J. LYTER DONALDSON, COMMISSIONER OF HIGHWAYS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

JURISDICTIONAL STATEMENT.

Filed June 27, 1941

Comes now, A. M. Whitney, doing business as Whitney Transfer Company, Huber and Huber Motor Express, Incorporated, and Silver Fleet Motor Express, Incorporated, appellants herein, and with the presentation of its petition for the allowance of an appeal from the District Court of

the United States for the Eastern District of Kentucky by a specially constituted three-judge court under Title 28, Section 380a of the United States Code, to the Supreme Court of the United States herewith and hereby presents this statement disclosing the basis upon which the Supreme Court of the United States has jurisdiction upon such appeal to review the orders and decrees from which said appeal was taken.

The above-named appellant in support of the jurisdiction of the Supreme Court of the United States to review on appeal the above-entitled cause and the decree of District Court denying the plaintiff's prayer for a preliminary injunction, and the final decree dismissing the plaintiff's complaint in said cause, respectfully represents:

I. Statute Sustaining Jurisdiction.

The statutory provision believed to sustain jurisdiction is Title 28, Section 380 of the United States Code, and particularly the following provisions thereof:

> "An appeal may be taken directly to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case.
>
> "The requirement respecting the presence of three judges also applies to the final hearing in such suit in the District Court; and a direct appeal to the Supreme Court of the United States may be taken from a final decree granting or denying a permanent injunction in such suit."

II. Kentucky State Statute, the Enforcement, Operation and Execution of Which Is Sought to Be Enjoined.

The Kentucky State Statute, the enforcement, operation and execution of which is sought to be enjoined, is an act of the General Assembly for the State of Kentucky 1932, Chapter 106, Article 1 and 3, and Article 1, 3, and 13, and num-

bered Sections 2739g-80, 2739g-82, and 2739g-92, of Carroll's Kentucky Statutes, Baldwin's Revision, 1936 edition, which sections are a part of the act designating freight motor trucks and trailers, and particularly certain provisions of sections above-mentioned, which read as follows:

"2739g-80. Definitions.—When used in this Act: 'Motortruck' means any motor-propelled vehicle designed for carrying freight or merchandise and not operated or driven on fixed rails or tracks; but it shall not include any self-propelled vehicles designed primarily for passenger transportation, but equipped with frames, racks, or bodies having a load capacity not exceeding One Thousand pounds. 'Semi-trailer Trucks' means any motor-propelled vehicle, not operated or driven on fixed rails or tracks, designed to draw, and to support the front end of a semi-trailer, which, together with the tractor, shall be considered to be one unit.

" 'Semi-trailer' means a vehicle designed to be attached to, and having its front end supported by, a motor truck or truck tractor, and intended for the carrying of freight or merchandise and with a load capacity of over One thousand pounds. 'Trailer' means any vehicle designed to be drawn by a motor truck or truck-tractor, but supported wholly upon its own wheels, and intended for the carriage of freight or merchandise and with a load capacity of over One thousand pounds.

"2739g-82. Weight.—No person shall operate on any highway any motor-truck or semi-trailer truck whose gross weight, including load, shall exceed Eighteen thousands pounds (1932, c. 106, sec. 3).

"2739g-92. Exemptions; when limitations to become effective.—

"(a) The provisions of this act shall not apply to motor trucks, semi-trailer trucks or trailers, owned by, or by any agency of, the United States, the Commonwealth of Kentucky, or any county or city or incorporated town therein.

"(b) If any motor-truck, semi-trailer truck or trailer, shall be licensed by any city or incorporated town in this State, and the registration plate or plates issued as evidence of said license shall be conspicuously exhibited on said motor-truck, semi-trailer truck or trailer in the manner required by ordinance, the provisions of Sections, Two (K.S. #2739g-81, Three (K.S. #2739g-82), Four, (K.S. #2739g-83), Five (K.S. #2739g-84), Six (K.S. #2739g-85), Nine (K.S. #2739g-88), Ten (K.S. #2739g-89) and Eleven (K.S. #2739g-90) hereof shall not apply to the operation of such motor-truck, semi-trailer truck or trailer, within the limits of the city or incorporated town issuing such license, or within ten miles of the limits thereof, if it be a city of the first, second, third or fourth class, or within five miles of the limits thereof, if it be a town of the fifth or sixth class. Provided, that all cities and incorporated towns are hereby empowered to provide, by ordinance, maximum limits with respect to the weight, height, width and length of motor-trucks, semi-trailer trucks and trailers, within their respective boundaries, not less, however, than the maximum limits prescribed in Sections three (K.S. #2739g-82), Four (K.S. #2739g-83), Five (K.S. #2739g-84), and Six (K.S. #2739g-85 hereof, to authorize the operation of trailers, therein, to impose license taxes on motor-trucks, truck-tractors, semi-trailers and trailers, and to require that all vehicles to which licenses may be issued shall affix the registration plate or plates issued as evidence of said licenses to said vehicles in some conspicuous place, to be prescribed by ordinance."

III. Date of Decree and Application for Appeal.

The order of the aforesaid District Court denying the plaintiff's prayer for an interlocutory injunction, and the final decree of said court dismissing plaintiff's complaint were entered together in a single document dated April 8, 1941, and the application for appeal was presented on May 8, 1941.

IV. Nature of the Case, Rulings of the Court, and Substantial Questions Involved.

This action is one brought by three of the largest operators of motor vehicles for hire in interstate commerce, whose principal office and place of business is located within the Commonwealth of Kentucky. It is claimed by complainants that the enforcement of the Kentucky Statutes herein above-referred to constitutes and results in an unjust discrimination against said complainants in violation of the commerce clause of the Constitution, as well as the Fourteenth Amendment of the Federal Constitution of the United States of America.

In addition it is the contention of the appellant that the Statutes, which by its definition of a "motor-truck" exempts a vehicle designed primarily for passenger transportation from the operation of the ridiculous eighteen thousand pound gross load limit, constitutes unjust discrimination against these appellants' businesses which is in direct violation of the commerce clause and the Fourteenth Amendment of the Federal Constitution.

The third point alleged and relied upon by these appellants is that the section of the Kentucky Statutes, to-wit, 2739g-92, authorizing municipalities to increase the eighteen thousand pound statutory limit by ordinance constitutes and results in unjust discrimination against these appellants in violation of the Fourteenth Amendment and the commerce clause of the Federal Constitution.

The District Court refused to grant a preliminary injunction and likewise over-ruled appellants' motion for an interlocutory injunction, and sustained the appellants' motion to dismiss the complaint and entered an order embodying these rulings in a single instrument on the 8th day of April, 1941. The authorities relied upon by appellants were as follows:

F. C. A. Title 49, Sec. 302; *Gibbons* v. *Ogden*, 9 Wheat. 1; *South Carolina Highway Department* v. *Barnwell Brothers*,

303 U. S. 177, 185, 189; *Morris* v. *Duby*, 274 U. S. 135, 143, 71 L. Ed. 966, 971, 47 S. Ct. 548; *Sproles* v. *Binford*, 286 U. S. 374; *Best and Company* v. *Maxwell*, Law Ed. advanced opinion, vol. 84 at page 274; *Lindsley* v. *Natural Carbonic Gas Company*, 220 U. S. 61, 78; *McCulloch* v. *Maryland*, 4 Wheat. 316, 407; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 498; *Caldwell* v. *North Carolina*, 187 U. S. 622, 626.

Appellants append hereto a copy of the opinion of the District Court delivered in this cause, together with the order and the court's findings of fact and conclusions of law, which are identified respectively as appellants' Exhibits A, B and C.

Respectfully submitted,

(Signed) H. W. VINCENT,
Counsel for Appellants.

EXHIBIT "A".

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY, FRANKFORT.

No. 10.

A. M. WHITNEY et al., *Plaintiffs,*

vs.

KEEN JOHNSON et al., *Defendants.*

Before Hamilton, Circuit Judge, Ford and Swinford, District Judges.

SWINFORD, *District Judge:*

The plaintiffs are operators of motor trucks engaged in interstate commerce through the State of Kentucky. The defendants are officers and employees charged with the duty of enforcing upon truck operators the regulations and statutes dealing with such matters.

This case is before us on the defendants' motion to dismiss the bill of complaint. The bill attacks the constitutionality under the Federal Constitution of Sections 2739g-80 and 2739g-82 Carroll's Kentucky Statutes, Baldwin's 1936 Revision. It is alleged that these sections of the statutes violate the due process and equal protection clauses of the Fourteenth Amendment and also the Commerce Clause (Art. 1, Section 8, par. 3).

The bill asks for an interlocutory injunction to prevent the defendants from enforcing the penal provisions of the Act.

Section 2739g-82 provides as follows: "No person shall operate on any highway any motor-truck or semi-trailer truck whose gross weight, including load, shall exceed Eighteen thousand pounds."

The sole question presented is whether the Kentucky Legislature had a right to fix this limitation.

The question is not novel. It has been before the Kentucky Court of Appeals and the United States Supreme Court. Sproles *v.* Binford, Sheriff, et al., 286 U. S. 374; Maurer *v.* Hamilton, 309 U. S. 598; South Carolina State Highway Dept. *v.* Barnwell Bros., 303 U. S. 177; Stephenson et al. *v.* Binford, et al., 287 U. S. 251; Hodge Drive-It-Your-

self Co., et al. *v.* Cincinnati, et al., 284 U. S. 335; Whitney, et al., *v.* Fife, Judge, et al., 270 Ky. 434; Ashland Transfer Co., et al. *v.* State Tax Commission, et al., 247 Ky. 144.

These cases conclusively hold that the matter of regulating the load limit of motor trucks is with the States. It is difficult to see how any other conclusion could be reached. The type, width and grade of the road must be determined in relation to the cost of construction and the ability of the State to pay for its road construction.

These elements must necessarily be controlling in fixing the size and weight of vehicles which use the roads. For the federal government to say to a state that you must permit trucks carrying loads equal to those permitted by Indiana is, of course, saying that Kentucky must build roads of such type and material that will carry such loads, even though it bankrupt the State. Such federal regulation over the affairs of a state are so clearly obnoxious to the entire system of government under which we live that it hardly admits of argument.

In the case of Sproles *v.* Binford, supra, on page 388 of the opinion the Supreme Court said: "In exercising its authority over its highways the State is not limited to the raising of revenue for maintenance and reconstruction, or to regulation as to the manner in which vehicles shall be operated, but the State may also prevent the wear and hazards due to excessive size of vehicles and weight of load. Limitations of size and weight are manifestly subjects within the broad range of legislative discretion. To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure. Ohio Oil Co. *v.* Conway, 281 U. S. 146, 159. When the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts but for the Legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome. Standard Oil Co. *v.* Marysville, 279 U. S. 582, 586; Price *v.* Illinois, 238 U. S. 446, 452, 453; Hadacheck *v.* Los Angeles, 239 U. S. 394, 410; Euclid *v.*

Ambler Realty Co., 272 U. S. 365, 368; Zahn *v.* Board of Public Works, 274 U. S. 325, 328."

In that case the Texas Legislature had enacted a statute fixing the weight limit at 7,000 pounds.

In the later case of South Carolina Highway Department *v.* Barnwell Brothers, supra, the Supreme Court said: "Since the adoption of one weight or width regulation, rather than another, is a legislative not a judicial choice, its constitutionality is not to be determined by weighing in the judicial scales the merits of the legislative choice and rejecting it if the weight of evidence presented in court appears to favor a different standard."

In the same opinion the Court said: "Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. There are few, local regulations of which is so inseparable from a substantial effect on interstate commerce. Unlike the railroads, local highways are built, owned and maintained by the state or its municipal subdivisions. The state has a primary and immediate concern in their safe and economical administration. The present regulations, or any others of like purpose, if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in large numbers within as well as without the state is a safeguard against their abuse."

A reading of these cases is convincing that the exact questions here presented have been considered and determined by the United States Supreme Court.

It is argued by counsel that the Act is unconstitutional because it permits passenger busses to carry greater weights than freight trucks. An examination of the Act discloses that the method prescribed by the statute in determining the weight of passenger busses is arrived at on the basis of the seating capacity which seems a most reasonable provision. To deny passenger busses the right to carry a reasonable amount of luggage and freight in connection with its passenger service would be to deny them the right to operate.

The weight of passenger busses is not limited by express statutory enactment. It is limited by a method of taxation

based on seating capacity. Section 2739o-2, Caldwell's Kentucky Statutes, Baldwin's 1936 Revision, April 1939 Supplement. This is, of course, in addition to the provision limiting weight in accordance with the width of tires applicable to all vehicles used on the public highways. Section 2739g-33(b). Caldwell's Kentucky Statutes, Baldwin's 1936 Revision, 1940 Supplement.

Even though there is a discrimination we do not see how that fact could make the legislation violative of the federal constitution. Class legislation is prohibited by the constitution of the State of Kentucky, Sections 59 and 60, but the Kentucky Court of Appeals has expressly held that the statute in question does not violate these provisions of the State Constitution. Ashland Transfer Company *v.* State Tax Commission, supra; Whitney *v.* Fife, Judge, supra.

This question was also raised in Sproles *v.* Binford, supra, wherein it was shown that the Texas statute permitted passenger busses to carry greater loads than freight trucks. I quote from the opinion: "Appellants press the contention that, as admitted by the District Court, the damage to the highways is as great from a load of persons as from a load of freight, and that the combined weight of vehicles and the load in the case of passenger busses is greater than the combined weight of vehicles and load carrying freight where the net load is limited to 7,000 pounds. These considerations would be controlling if there were no other reasonable basis for classification than the mere matter of weight. But in passing upon the question of the constitutional power of the State to fashion its regulations for the use of the highways, it maintains, we cannot ignore the fact that the State has a distinct public interest in the transportation of persons. We do not think that it can be said that persons and property, even with respect to their transportation for hire, must be treated as falling within the same category for purposes of highway regulation. The peculiar importance to the State of conveniences for the transportation of persons in order to provide its communities with resources both of employment and of recreation, the special dependence of varied social and educational interests upon freedom of intercourse through safe and accessible facilities for such transportation, are sufficient to support a classification of

passenger traffic as distinct from freight. There is no constitutional requirement that regulations must reach every class to which it might be applied—that the legislature must regulate all or none. Silver *v.* Silver, 280 U. S. 117, 123. The State is not bound to cover the whole field of possible abuses. Patsone *v.* Pennsylvania, 232 U. S. 138, 144. The question is whether the classification adopted lacks a rational basis. Lindsley *v.* Natural Carbonic Gas Co., 220 U. S. 61, 78; Keokee Coke Co. *v.* Taylor, 234 U. S. 224, 227; Miller *v.* Wilson, 236 U. S. 373, 384; Carley *v.* Snook, supra; Smith *v.* Cahoon, supra. We cannot say that such a basis is lacking in this instance."

It is urged that because of this limitation Kentucky is seriously interfering with interstate commerce. That it is so far out of line with other states from which and to which tonnage by truck must pass, in gross weight permitted to be carried, that there is produced a "bottleneck" which seriously interferes with the national defense.

This is a question which peculiarly addresses itself to the State Legislature of the various States. Acting for the interest of her people and with knowledge of the terrain and materials with which the State must deal in constructing her highways these weights are fixed in order that a "bottleneck" can be avoided. To permit tonnage to pass over roads unable to bear the weight and over bridges incapable of accommodating such loads would result in a complete break down and destroy the entire course over which even trucks of a much lighter weight can travel. Roads and bridges are constructed with weight limitations. If the State can only afford to build roads that are capable of carrying a certain load there is nothing further that can be done about it. Our sister States because of physical and topographical conditions, accessibility to materials, taxable wealth and many other circumstances which enter into road construction, may be able to build roads of such construction for hundreds of miles that would bankrupt Kentucky if she undertook to build one through highway to the neglect of all other roads in the State. This Court cannot be asked to say whether a certain load limit is proper or improper. The question must be addressed to the legislature which has the facilities to determine such matters and

must be assumed to act for the best interest and protection of the people of Kentucky with due regard for the interstate relationship. If this load limit is too small the matter should be addressed to the legislature.

It is insisted that the Act under consideration violates the Commerce Clause of the Federal Constitution. The argument on this point is somewhat obscure. It is difficult to see just what counsel is endeavoring to show. The case of United States of America *v.* Appalachian Electric Power Company, decided by the Supreme Court of the United States on December 16, 1940, cited in the plaintiffs' brief, can have no possible bearing on the issue involved here. It is urged that this case is a strong indication that the federal government is within its rights in extending its exercise over commerce. The decision in the Appalachian case was based upon an Act of Congress known as the Rivers and Harbors Act of 1899 (30 Stat. 1151, 33 U. S. C. Sections 401, 403.) The Supreme Court concluded that the river in question, the New River in Virginia, was navigable and came under the provisions of the Act.

In the case at bar the exact opposite has been held. In the case of Maurer *v.* Hamilton, supra, the question for decision was a Pennsylvania law regulating the operation of motor vehicles under certain conditions was suspended by the Interstate Commerce Commission under the Federal Motor Carriers Act of 1935, 49 Stat. 543, 49 U. S. C. Sections 301-327.

In that case the question of regulation of weight was discussed at length.

Section 225 of the Act authorizes the Interstate Commerce Commission to investigate and report to Congress on the "need for Federal regulation of the size and weight of motor vehicles." After quoting this section the opinion in the Maurer case states: "Unlike § 204 (a) (3), which makes it the duty of the Commission 'if need therefor is found' to establish reasonable requirements to promote safety of operation and to prescribe standards of equipment for 'private carriers of property,' § 224 imposes no duty and confers no authority on the Commission to regulate

the sizes and weights of motor vehicles. Its authority is limited to investigation and report of the need of such regulation."

At another point in the opinion the Court says: "This Court has also had occasion to point out that the sizes and weights of automobiles have an important relation to the safe and convenient use of the highways, which are matters of state control. Sproles *v.* Binford, 286 U. S. 374; South Carolina Highway Dept. *v.* Barnwell Bros., supra."

In view of this most recent pronouncement by the Supreme Court (April 22, 1940) it is difficult to understand why counsel can argue that the statute here considered is in violation of the Commerce Clause.

We are of the opinion that the motion for an interlocutory injunction should be overruled, and the defendants' motion to dismiss the bill of complaint should be sustained. Let proper orders in accordance herewith be submitted.

February 21, 1941.

EXHIBIT "B".

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY, FRANKFORT.

No. 10.

A. M. WHITNEY, et al., *Plaintiffs,*

vs.

KEEN JOHNSON, et al., *Defendants.*

Judgment.

It is adjudged that the plaintiffs' motion for an interlocutory injunction is overruled.

That the complaint and amended complaint be dismissed.

That the plaintiffs pay all costs of this action and that the defendants have judgment for their costs expended.

ELWOOD HAMILTON,
Judge of the United States Circuit Court of Appeals;
H. CHURCH FORD,
Judge of the United States District Court;
MAC SWINFORD,
Judge of the United States District Court.

April 8, 1941,
Certified by A. B. Ronn, Clerk.

EXHIBIT "C".

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY, FRANKFORT.

No. 10.

A. M. WHITNEY, et al., *Plaintiffs,*

vs.

KEEN JOHNSON, et al., *Defendants.*

Findings of Fact and Conclusions of Law.

FINDINGS OF FACT.

1.

The plaintiffs are operators of motor trucks, engaged in interstate commerce in and through the State of Kentucky.

2.

The defendants are officers and employees of the Commonwealth of Kentucky charged with the responsibility of enforcing the provisions of Sections 2739g-83, 2739g-84 and 2739g-85, Carroll's Kentucky Statutes, Baldwin's 1936 Revision.

3.

The matter in controversy is in excess of $3,000.00, exclusive of interest and costs.

4.

That trucks hauling freight over the highways of Kentucky are limited to a maximum weight of 18,000 pounds by Section 2739g-82, Carroll's Kentucky Statutes, Baldwin's 1936 Revision.

5.

That the maximum weight applies only to motor trucks hauling freight and does not apply to passenger busses hauling passengers and express.

6.

That the weight of passenger busses is not limited by express statutory enactment but is limited by a method of taxation based on seating capacity by Section 2739o-2, Carroll's Kentucky Statutes, Baldwin's 1936 Revision, April 1939 Supplement.

7.

That Section 2739g-33 (b), Carroll's Kentucky Statutes, Baldwin's 1936 Revision, 1940 Supplement, limits the weight of all vehicles used on the highways in Kentucky in proportion to the width of the tires used on such vehicles.

CONCLUSIONS OF LAW.

1.

This Court has jurisdiction of the parties to, and the subject matter involved in, this action.

2.

The power to regulate the size and weight of motor trucks engaged in transporting freight for hire over the highways of a state is a power retained by the several states.

3.

Congress did not by the enactment of the Federal Motor Carriers Act of 1935 (49 U. S. C. A., Sections 301-327) re-

strict the power of the states to impose uniform limitations upon the size and weight of motor vehicles engaged in the transportation for hire of property over the highways of the several states.

4.

Sections 2739g-80, 2739g-82, 2739g-92 and 2739g-101, Kentucky Statutes, Carroll's 1936 Edition, and being parts of Chapter 106 of the Acts of the General Assembly of Kentucky at its 1932 Session, limiting the size and weight of motor trucks and semi-trailer trucks, constitute a valid exercise of the police power of the State of Kentucky.

5.

The Act (Chapter 106, Acts of 1932 General Assembly) is not in violation of the Commerce Clause (Section 8 of Article 1) of the Constitution of the United States.

6.

The Act is not in violation of the Privileges and Immunities Clause (Clause 1, Section 1, Article 4) of the Constitution of the United States.

7.

The Act does not violate the Due Process and Equal Protection Clauses of the 14th Amendment to the Federal Constitution.

8.

Section 2739g-80, Kentucky Statutes, Carroll's 1936 Edition, exempting from the provisions of the Act attacked herein, self-propelled vehicles designed primarily for passenger transportation, but equipped with frames, racks or bodies having a load capacity not exceeding 1,000 pounds, is not discriminatory and does not violate Section 1 of the 14th Amendment to the Federal Constitution.

9.

The facts alleged in plaintiffs' petition fail to state a claim upon which the relief sought in the petition can be granted.

10.

The facts stated in the petition, and the facts disclosed in the affidavits filed by plaintiffs upon their motion for an interlocutory injunction, are not sufficient to authorize the granting of an interlocutory injunction.

11.

The court concludes that defendants' motion to dismiss plaintiffs' petition should be sustained; and that the defendants' motion for an interlocutory injunction should be and the same is hereby overruled and the injunctive relief is denied.

ELWOOD HAMILTON,
Judge of the United States Circuit Court of Appeals;
H. CHURCH FORD,
Judge of the United States District Court;
MAC SWINFORD,
Judge of the United States District Court.

April 8, 1941.
Certified by A. B. Ronn, Clerk.

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